United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,152

SALVATORE PISTORIO,
Appellant

v.

CHARLES EINBINDER,
Appellee

Appeal From the United States District Court for the District of Columbia

MARTIN E. GEREL
LEE C. ASHCRAFT
JOSEPH H. KOONZ, JR.
925 - 15th Street, N. W.
Washington, D. C. 20005
Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

The question is whether the Deputy Commissioner could properly modify an existing compensation award and make the subsequent award retroactive under Section 922 of the Act on the ground of change in condition when the record contains no substantial evidence that the employee's condition had changed from the date of the previous award and the Deputy Commissioner refused to permit the appellant to introduce evidence pertaining to his condition prior to the date of the first award.

INDEX

JURISDICTIONAL STATEMENT 1
STATEMENT OF THE CASE 2
STATEMENT OF POINTS 3
SUMMARY OF ARGUMENT 4
ARGUMENT 5
I. There Was No Substantial Evidence in the Record to Support a Modification of the Existing Award Based on a Change in Conditions 5
II. The Deputy Commissioner Was Barred From Entering an Award Modifying a Prior Award Retroactively 9
CONCLUSION 11

TABLE OF CASES CITED

Atlantic Coast Shipping Company v. Golubiewski, 14 F. Supp. 280 7
Avignone Freres, Inc. v. Cardillo, 73 App. D.C. 149, 150, 117 F. 2d 385, 386 8
Bay Ridge Operating Company v. Lowe D.C. N.Y., 14 F Supp. 280 7
Burley Welding Works v. Lawson, 142 F 2d 964 6
Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 8
Friend v. Britton, 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822 7
Jarka Corporation v. Hughes, C.A.N.Y., 299 F. 2d 534 (1962) 7, 9, 10
Pillsbury v. Alaska Packers Assn., 85 F 2d 758. 6
Vinson v. Einbinder, 113 U.S. App. D.C. 246, 307 F.2d 387 8

STATUTES

Title 33, U.S.C., Sec. 922 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,152

SALVATORE PISTORIO,

Appellant

v.

CHARLES EINBINDER,

Appellee

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia took jurisdiction over this case pursuant to Title II, Section 306 of the District of Columbia Code (1961) and 33 U.S.C. 21(b). This court has jurisdiction over this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action arising from an award entered by the appellee Deputy Commissioner Einbinder on March 27, 1964. (JA 35-38) The appellant had made claim for workmen's compensation benefits arising from an injury he sustained at work on March 31, 1960. (JA 6-7) As a consequence of this claim an award of compensation was made by the appellee on August 20, 1962. (JA 8) At that time the appellant was awarded a 50% permanent partial disability rating.

On March 11, 1963, by letter addressed to the Bureau of Employees' Compensation, the Liberty Mutual Insurance Company requested a modification of the August 20, 1962 award on the ground of change in conditions. (JA 33-34) At the time the request was made a copy of a medical report from Dr. Norman H. Horwitz, dated February 18, 1963, was submitted to the Bureau of Employees' Compensation and relied on as a basis for the modification. (JA 32-33)

A formal hearing was held before the appellee Einbinder on November 22, 1963 for the express purpose of taking testimony to review an order filed August 20, 1962. (JA 12-31) During the course of the hearing appellee Einbinder refused to allow any evidence to be introduced "about anything which occurred prior to August 20, 1962." (JA 15, 18)

The testimony at the hearing from the appellant was that his condition had not changed since August 20, 1962. (JA 20) He did testify that he was doing some very light work at his new job but he could no longer work as a tile setter. (JA 17, 19)

The medical testimony during the hearing was taken from Dr. Norman H. Horwitz and Dr. James H. Masterson. Both doctors testified that the condition of the appellant had not changed. (JA 24, 26, 30, 31)

Following the hearing the appellee, Deputy Commissioner Einbinder, entered an award modifying the original award and reduced the percentage of disability from 50% to 15%. (JA 35) In addition to this

reduction in disability, the appellee Einbinder also made the modifying award retroactive to June 1, 1962 and determined that the 15% permanent disability begin on that day. (JA 36) In support of this position the appellee Einbinder found as a fact the appellant's condition had improved because since June 1, 1962, he was able to sweep walks, trim rose bushes and get down on his hands and knees to pull up weeds. (JA 36) The testimony from both the appellant and his boss, Earl T. Loy, was that Mr. Pistorio could only do very light work because of his back condition since the injury on his job. (JA 38, 39)

The appellant filed an action to set aside the modification of the award on April 7, 1964. After answer was filed, the appellee, Deputy Commissioner Einbinder, filed a motion for summary judgment. (JA 4-5) This motion was adopted by Liberty Mutual Insurance Company and granted by the District Court on November 20, 1964. (JA 39) This appeal followed. (JA 39)

STATEMENT OF POINTS

1. The trial court erred in granting appellees' motion for summary judgment.

2. The trial court erred in refusing to set aside the modification of the award.

3. The modification of the award by appellee Deputy Commissioner was totally and completely unsupported by the record.

4. There was no evidence whatsoever to support the modification of the award by the appellee Deputy Commissioner.

5. The Deputy Commissioner erred in modifying the award retroactively, especially after having admonished counsel for the parties not to introduce evidence pertaining to events prior to the initial award.

SUMMARY OF ARGUMENT

It is the position of the appellant that the modification of the award by the Deputy Commissioner is in error on two substantial grounds. The record taken as a whole does not support a modification. The overwhelming testimony at the formal hearing supports the position of Mr. Pistorio that his condition had not changed from the time of the last award. The record clearly shows that each witness, medical and lay, testified that the appellant's condition had not changed. Since the appellant's condition was the basis for the request for a modification, there was no substantial evidence to support the findings of the Deputy Commissioner.

This is not a case where the reviewing court is asked to decide an appeal on conflicting testimony. This determination is rightly in the province of the Deputy Commissioner. However, when this Court is presented with a glaring example of a decision completely and wholly unsupported by the record it should have no choice but to reverse. To allow this modification of the award to stand based on the record of the formal hearing would be to condone and encourage arbitrary decisions by the Deputy Commissioner completely contrary to the letter and spirit of the law.

The second substantial ground for reversal concerns the legality of the award by the Deputy Commissioner in making it retroactive. Especially is this in error when the Deputy Commissioner barred the introduction of any evidence pertaining to the appellant's condition prior to August 20, 1962. If the decision of the Deputy Commissioner is to stand under the circumstances mentioned above, in the future the claimant is at the mercy of the Commissioner. It is up to this Court at this time to correct the situation as it exists in this case. If the award entered in August of 1962 was in error and a mistake made by the Deputy Commissioner at that time, the very least that should be done is to have this

Court send the matter back to the District Court with instructions to the Deputy Commissioner to clarify his position.

Time and again this Court has said that the findings of the Deputy Commissioner must be supported by substantial evidence. In the instant case, there is no evidence, not even some, that the appellant's condition had changed so as to support a modification of an award. This, coupled with the fact that the Deputy Commissioner made the modified award retroactive, after refusing to permit the introduction of evidence, leads but to the conclusion that the decision of the District Court should be reversed and the matter remanded with appropriate instructions.

ARGUMENT

I.

There Was No Substantial Evidence in the Record To Support a Modification of the Existing Award Based on a Change in Conditions.

The appellant, a tile setter by trade, was injured in the course of his employment on March 31, 1960. As a result of his accident on the job Mr. Pistorio suffered a ruptured disc necessitating surgery for the removal of the disc. (JA 7) After a claim was filed and compensation for temporary total disability paid for a period of time, the Deputy Commissioner, appellee Einbinder, entered an order awarding Mr. Pistorio 50% permanent partial disability. (JA 7) This award was filed on August 20, 1962.

The appellant was under the care of Dr. Norman H. Horwitz and was examined on several occasions by Dr. James H. Masterson. On March 11, 1963, by correspondence addressed to the Compensation Bureau, the insurance carrier, Liberty Mutual, requested a modification of the award based on the medical report of Dr. Horwitz. (JA 32-

33) The hearing was held before the appellee Einbinder on November 22, 1963.

At the outset the Deputy Commissioner announced that the hearing was being held to review the prior award. The more specific purpose of the hearing was an attempt by the insurance carrier to have the existing award modified based on a "change of conditions" under Section 922 of the Act. This section provides as follows:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary."

"A 'change in condition' as ground for modification of a compensation award means a change in employee's **physical condition**, and not other conditions." (emphasis supplied) *Burley Welding Works v. Lawson*, 142 F 2d 964; *Pillsbury v. Alaska Packers Association*, 85 F 2d

758; *Bay Ridge Operating Company v. Lowe D.C. N.Y.*, 14 F. Supp. 280; *Atlantic Coast Shipping Company v. Golubiewski*, 14 F. Supp. 280; *Jarka Corporation v. Hughes*, C.A. N.Y., 299 F 2d 534 (1962).

In the instant case there was absolutely no evidence introduced at the formal hearing that the plaintiff's physical condition had changed. The award entered on March 27, 1964 (see plaintiff's Exhibit No. VI) was not based on substantial evidence.

A review of the record and the testimony of each witness readily reveals that there was no evidence supporting a modification of the existing award. Dr. Horwitz stated that Mr. Pistorio's condition had not changed. Dr. Masterson testified that the appellant continued to have a 50% permanent disability.

It was pointed out in *Jarka Corporation v. Hughes*, 299 F 2d 534 (2nd Cir.) (1962):

> "A change in condition necessarily implies a change from something previously existing."

If the appellant's condition was the same prior to the hearing as it was at the time of the hearing then it would seem elementary that the condition did not change. Yet the appellee found as a fact that Mr. Pistorio's condition had improved. The conclusion was based on the fact that the appellant at the time of the hearing "sweeps walks and trims rose bushes and kneels down to pull up weeds."

The record shows that the appellant was a tile setter prior to his accident and was engaged in work activities compatible with his trade. Since his accident he has been unable to carry on this trade and is engaged in light work as a gardener. The fact that the appellant now sweeps walks and trims rose bushes is not substantial evidence to result in a finding that he is now but 15% disabled.

In *Friend v. Britton*, 95 U.S. App. D.C. 139, 141, 220 F. 2d 820, 822, this court stated:

"Our task is to ascertain whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole * * *. The reviewing court will not sustain the administrative findings merely because they are substantiated by some isolated evidence. Our review must also take account of the settled rule that the Act is to be construed with a view to its beneficient purposes. Doubts, including the factual, are to be resolved in favor of the employee or his dependent family." See also: *Vinson v. Einbinder*, 113 U.S. App. D.C. 246, 307 F.2d 387, *cert. den. Aetna Casualty & Surety Co. v. Vinson*, 83 S. Ct. 880, 372 U.S. 934, 9 LED2d 765--Work. Comp. 52, 1536, 1939.

The question of what constitutes "substantial evidence" has been decided for some time by this court and the Supreme Court.

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126. Cited in *Avignone Freres, Inc. v. Cardillo*, 73 App. D.C. 149, 150, 117 F.2d 385, 386.

The record discloses that there was no evidence, much less substantial, on which the Deputy Commissioner could base a modification of the award. The appellant submits that on that ground alone the decision of the lower court should be reversed.

ARGUMENT

II.

The Deputy Commissioner Was Barred From Entering an Award Modifying a Prior Award Retroactively.

At the time of the formal hearing on November 22, 1963 held to review the award filed on August 20, 1962, the appellee at the outset instructed counsel that he would hear no testimony relative to any conditions that existed prior to that date. However, when the award was modified the Deputy Commissioner made it retroactive to June 1, 1962. No mention was made in the award dated March 27, 1964 to explain or attempt to correct the prior award. The law applicable here gives the Deputy Commissioner authority to make an award retroactive. This is conceded. However, the law does not permit an arbitrary finding by the Deputy Commissioner with no basis in fact or explanation set forth as a reason for the change. If there was a mistake of fact then this should have been clarified by the appellee.

This same issue was raised on a prior occasion in the case of *Jarka Corporation v. Hughes*. There the court held:

> "In any case where a Deputy Commissioner would modify a prior award retroactively to the date of injury because he evaluates the claimant's condition differently, it necessarily follows that he believes that the prior determination of condition was incorrect and based upon a mistake of fact, and he cannot be making a new order because of a change of condition."
>
> "In order to modify a previous order on the theory of mistake, a new order should make it clear that it is doing so, should review the evidence of the first hearing and should indicate in what respect

> the first order was mistaken - whether in the inaccuracy of the evidence, in the impropriety of the inferences drawn from it, or, as may be true in the present case, because of the impossibility of detecting the existence of the particular condition at the time of the earlier order."
>
> "The Deputy Commissioner should indicate the date when the claimant's condition changed and state the evidence supporting this conclusion." *Jarka Supra.*

The appellant readily admits that the Deputy Commissioner has rather broad powers and the scope of appellate review is limited. But these powers are not without limitation and they must be reviewed when the facts and circumstances of a particular case warrant close scrutiny. This appeal is just such a case.

The Deputy Commissioner has entered an award that is completely without support in fact or in law. The first award was entered giving the appellant 50% permanent disability. Payments were being made under the award. Now we have a situation where the Deputy Commissioner has in effect vacated the prior award but has not followed the express provisions of Section 922 of the Act. To allow this situation to remain would be completely contrary to the numerous precedents in this jurisdiction and in direct opposition to the letter and spirit of the workmen's compensation law.

CONCLUSION

The appellant submits that the record taken as a whole does not contain substantial evidence to support the decision of the Deputy Commissioner in modifying the existing award and consequently it should be reversed. In addition, the lower court committed reversible error by allowing the modification of the award to be made retroactive, contrary to the express provision of the Act. For the reasons set forth above the appellant respectfully submits that the decision of the lower court in granting summary judgment be reversed with instruction to reinstate the award of August 20, 1962.

Respectfully submitted,

ASHCRAFT AND GEREL

By: JOSEPH H. KOONZ, JR.
925 Fifteenth Street, N.W.
Washington, D.C.
Attorney for Appellant

TABLE OF CONTENTS

Action to Set Aside Modification of Award, filed April 7, 1964 1

Answer of Defendants Antonio Troiano Tile & Marble Co., Inc. and Liberty Mutual Insurance Company, filed May 5, 1964 3

Answer of Defendant Deputy Commissioner, filed June 9, 1964 4

Defendant Deputy Commissioner's Motion for Summary Judgment, filed September 19, 1964 4

Opposition to Motion for Summary Judgment, filed October 5, 1964 5

Award of Compensation, August 20, 1962 6

Medical report of Anderson Orthopaedic Clinic, August 30, 1961 9

Medical report of Anderson Orthopaedic Clinic, November 13, 1963 . . 11

Excerpts From Proceedings Before Bureau of Employees' Compensation, November 22, 1963 12

Witnesses:

Salvatore Pistorio 12
Norman H. Horwitz, M.D. 22
Stuart L. Loy 28
James H. Masterson 29

Supplementary Neurosurgical Report, Norman H. Horwitz, M.D., dated February 18, 1963 32

Letter of March 11, 1963, Liberty Mutual to Bureau of Employees Compensation 33

Modification of Award Order, March 27, 1964 35

Order of November 20, 1964, Hart, J. 39

Notice of Appeal, December 21, 1964 39

JOINT APPENDIX

[Filed April 7, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALVATORE PISTORIO
10011 Woodland Drive
Silver Spring, Maryland

Plaintiff

vs.

CHARLES EINBINDER
DEPUTY COMMISSIONER
U. S. Department of Labor
Bureau of Employees' Compensation
1156-15th Street, N. W.
Washington, D. C.

Defendant

CA No. 825-'64

ACTION TO SET ASIDE MODIFICATION OF AWARD

1. The jurisdiction of this Court is based on the provisions of Section 921 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901), as made applicable to employment in the District of Columbia by virtue of Title 36, D.C. Code, Section 501.

2. The defendant Charles Einbinder is a citizen of the United States and a resident of the District of Columbia, and is sued in his official capacity as Deputy Commissioner of the Bureau of Employees' Compensation for the District of Columbia and is hereinafter referred to as the Deputy Commissioner.

3. On August 20, 1962, a compensation order was entered by the defendant Deputy Commissioner awarding the plaintiff compensation for

50 per cent permanent partial disability of the body as a whole for injuries sustained during his employment on March 31, 1960.

4. Thereafter, the plaintiff's employer, through its workmen's compensation insurance carrier, made application for a modification of the award based on a change of condition. As a result of such application a formal hearing was held before the defendant. Following the completion of the hearing a compensation order modifying the existing award was entered on March 27, 1964, reducing the disability from 50 per cent to 15 per cent permanent partial.

5. The plaintiff alleges that the Deputy Commissioner's Findings of Fact are not supported by substantial evidence considering the record as a whole and the modification of the award is arbitrary and capricious.

6. The plaintiff further alleges that the decision of the Deputy Commissioner making the award retroactive is not in accordance with the law and is not supported by the evidence.

7. The Deputy Commissioner further erred in finding that the plaintiff's physical condition had improved when the substantial evidence showed his condition remained the same as it was at the time of the award on August 20, 1962.

WHEREFORE, the premises considered, the plaintiff requests that the compensation order modifying the award be set aside and that the matter be remanded to the Deputy Commissioner for a Compensation Order consistent with the law and facts as indicated above.

ASHCRAFT AND GEREL

By /s/ Joseph H. Koonz, Jr.

/s/ Martin E. Gerel

/s/ Lee C. Ashcraft

/s/ William E. O'Neill, Jr.

Attorneys for Plaintiff

[Filed, May 5, 1964]

ANSWER OF DEFENDANTS ANTONIO TROIANO TILE & MARBLE CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

These defendants admit a compensation order was entered in case No. 15023-23 on August 20, 1962, awarding the plaintiff compensation, and aver that said compensation order was entered as a result of agreement between the parties, and that no formal hearing was held prior to the issuance of that order. These defendants admit that a hearing was held thereafter, and on March 27, 1964, a modification of the prior award was entered which changed the amount and degree of disability set forth in the earlier award. These defendants deny that the modification of the award was not in accordance with the law and was not supported by the evidence. They deny that the findings of fact were not supported by substantial evidence and deny that the award was arbitrary and capricious. These defendants specifically deny the allegations in Paragraphs 5, 6 and 7 of the complaint and they further deny each and every other material allegation in the complaint not herein specifically answered.

HOGAN & HARTSON

By: /s/ Charles W. Halleck
Attorney for Petitioners,

[Certificate of Service, 5 May 1964.]

[Filed June 9, 1964]

ANSWER OF DEFENDANT DEPUTY COMMISSIONER

Defendant, Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3 and 4.

2. Denies the allegations contained in paragraphs numbered 5, 6 and 7.

3. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respects in accordance with law.

WHEREFORE, defendant deputy commissioner prays that the complaint be dismissed.

DAVID C. ACHESON
United States Attorney

CHARLES T. DUNCAN
Principal Assistant United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

ELLEN LEE PARK
Assistant United States Attorney

Attorneys for Defendant Einbinder

[Certificate of Mailing, 1964.]

[Filed September 19, 1964

DEFENDANT DEPUTY COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT

Defendant deputy commissioner moves the Court to sustain his compensation order herein appealed by plaintiff, Salvatore Pistorio, and to enter judgment for defendant, dismissing the complaint, on the ground that there is no genuine issue as to any material fact and that

the defendant is entitled to judgment on the record as a matter of law.

This motion is addressed to the complaint's assignments and specifications of error alleged to have been committed by defendant deputy commissioner and is based upon the attached certified copy of the transcript of proceedings held before the defendant as deputy commissioner, Bureau of Employees' Compensation, United States Department of Labor, on October 10, 1963, November 22, 1963 and February 17, 1964, in the matter of Salvatore Pistorio, Case No. 15023-23, together with the exhibit therein.

DAVID C. ACHESON
United States Attorney

CHARLES T. DUNCAN
Principal Assistant United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

ELLEN LEE PARK
Assistant United States Attorney

Attorneys for Defendant Einbinder

[Filed October 5, 1964]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, through counsel, and moves this Honorable Court for an order denying defendant's motion for Summary Judgment and for reason therefore prays that the attached memorandum of Points and Authorities be read as a part of this opposition.

ASHCRAFT & GEREL

By: Joseph H. Koonz, Jr.

[Certificate of Service, October 1964.]

[Filed October 5, 1964]

[Plaintiff's Exhibit No. I]

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act SALVATORE PISTORIO Claimant vs. ANTONIO TROIANO TILE & MARBLE CO.,INC. Employer LIBERTY MUTUAL INSURANCE COMPANY Insurance Carrier	Compensation Order AWARD OF COMPENSATION CASE NO. 15023-23

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on March 31, 1960, the claimant above named was in the employ of the employer above named, whose address is 313 Kennedy Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled, "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the

employer for compensation under the said Act was insured by the Libery Mutual Insurance Company; that on the said day the claimant herein, while performing services for the employer as a tile setter's helper and while lifting a bag of cement, sustained personal injury resulting in his disability when he experienced a severe pain in his low back, as a consequence of which he suffered trauma to the back, including rupture of the intervertebral disc between the fourth and fifth lumbar vertebrae on the right side, necessitating surgical intervention for the removal of the said disc, followed by the development of a right inguinal hernia; that the injury arose out of and in the course of the employment; that written notice of the injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of section 7(a) of the Act; that the average weekly wages of the claimant herein at the time of the injury were $81; that as a result of the injury, the claimant was wholly disabled from April 1, 1960 to March 29, 1962, inclusive, 104 weeks, and for such temporary total disability he is entitled to compensation at the maxium rate of $54 per week, amounting to $5,616; that since March 30, 1962 the claimant has suffered a 50 per cent partial disability, representing a reduction in his weekly wage-earning capacity from $81 to $40.50, which disability is continuing and is now permanent; that the claimant is entitled to compensation for such permanent partial disability under section 8(c) (21) of the Act at the rate of $27 per week (66-2/3 per cent of $40.50, the difference between the average weekly wages of $81 and the reduced weekly wage-earning capacity of $40.50); that accrued compensation for permanent partial disability from March 30, 1962 to August 16, 1962, inclusive, 20 weeks at the rate of $27 per week, amounts to $540; that accrued compensation for temporary total disability and permanent partial disability to August 16, 1962, inclusive, amounts to $6,156; that the

employer and the insurance carrier have paid $6,125.14 to the claimant as compensation.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Antonio Troiano Tile & Marble Co., Inc., and the insurance carrier, the Liberty Mutual Insurance Company, shall pay to the claimant herein compensation as follows: For temporary total disability, 104 weeks at the rate of $54 per week, from April 1, 1960 to March 29, 1962, inclusive, amounting to $5,616; and for permanent partial disability, 20 weeks at the rate of $27 per week, from March 30, 1962 to August 16, 1962, inclusive, amounting to $540, or a total of $6,156. The employer and the insurance carrier, having already paid $6,125.14 to the claimant as compensation, shall pay forthwith the balance of $30.86; and thereafter shall continue payments of compensation for permanent partial disability to the claimant at the rate of $27 per week, payable in bi-weekly installments subject to the limitations of the Act or until further order of the Deputy Commissioner.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Ashcraft and Gerel, Attorneys at Law, 925 - 15th Street, N. W., Washington, D. C., in the sum of $700, which amount has been paid.

Given under my hand at Washington, D.C.
this twentieth day of August, 1962

/s/ Charles Einbinder
Deputy Commissioner
District of Columbia Compensation District

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by mail to the claimant, the employer, the insurance carrier and the attorneys for the claimant at the last known address of each as follows:

Name	Address
Mr. Salvatore Pistorio	6626 Georgia Avenue, N. W. Washington, D. C.
Antonio Troiano Tile & Marble Co., Inc.	313 Kennedy Street, N. W. Washington, D. C.
Liberty Mutual Insurance Company	1346 Connecticut Avenue, N. W. Washington, D. C.
Ashcraft and Gerel Attorneys at Law	925 - Fifteenth Street, N. W. Washington, D. C.

/s/ Charles Einbinder
Deputy Commissioner

Mailed: August 20, 1962

[Filed October 5, 1964] [Plaintiff's Exhibit No. II]

ANDERSON ORTHOPAEDIC CLINIC
Arlington 6, Virginia

Report on: PISTORIO, SALVATORE
6226 Georgia Avenue
Washington, D. C.

Date of Examination: August 30, 1961

Chief Complaint: Residuals of accident

History: This patient is in for an independent evaluation following a disc procedure which was done by Dr. Norman Horowitz about 18 months ago and the patient, following surgery, has been unable to return to work. He has been wearing a back brace and is in for my opinion today. 2

There is a distinct language barrier and since my Italian is not good, it is rather difficult to exactly ascertain how the patient injured his back and whether or not myelographic studies were done prior to removal of the disc or at what level the disc was removed.

Examination:

Careful physical examination today reveals he stands with a fixed swayback and does not move well in any direction. There is a distinct change in reflex along the left leg with the reflexes out completely at the ankle, straight leg raising is positive at about 30 degrees on the left side and about 70 degrees on the right and the findings are consistent with nerve root irritation of the chronic variety.

X-rays were taken of the back and review of these show rather extensive osteoarthritic changes with some narrowing of the disc spaces between L3 and L-4 and L-5, S-1. The patient has been on no exercises and the present brace which he has does not give him adequate support. It is entirely possible that further work will be needed on him before maximum improvement is obtained and at the present time I feel that he is totally disabled for heavy work. It is possible he could take a light job and if I had to rate him today, a rating of 50 percent permanent-partial disability would be my opinion.

/s/ James H. Masterson, M.D.

[Plaintiff's Exhibit No. III]

ANDERSON ORTHOPAEDIC CLINIC
Arlington 6, Virginia

Report on: PISTORIO, SALVATORE
6226 Georgia Avenue
Washington, D. C.

Date of Examination: November 13, 1963

Progress Report: This patient is rechecked today. He states that since he last saw me, he has not improved both as far as the neck and back are concerned. He has, however, been able to work as a gardner on his knees and has made about $70.00 to $80.00 a week from which he supports a family of five.

Examination shows about the same findings as when seen two years ago. There is marked spasm in the back. He is unable to bend forward without the spasm increasing. He refuses to turn his neck voluntarily to the left side, although he turns to the right without too much trouble. Reflexes can be obtained at both knees but cannot be obtained at either ankle and I feel that the patient is still disabled from his usual type of work and the 50% permanent-partial disability rating still stands.

/s/ James H. Masterson, M.D.

EXCERPTS FROM PROCEEDINGS BEFORE
BUREAU OF EMPLOYEES' COMPENSATION
DEPARTMENT OF LABOR

[November 22, 1963]

* * *

[6] THE DEPUTY COMMISSIONER: On March 14, 1963, the employer and the insurance carrier filed an application for modification and review of the award of compensation filed on August 20, 1962, on the ground that there was a change in the claimant's condition pertaining to a change in the extent of the claimant's disability.

We are now at a hearing upon the insurance carrier and the employer's application for a review of the order.

* * *

SALVATORE PISTORIO

was called as a hostile witness by and on behalf of the Respondents, and having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

[8] THE DEPUTY COMMISSIONER: Let the record show that Counsel for the Claimant has advised me that a Mrs. Mary Fama, F-a-m-a — what is your address?

THE INTERPRETER: 1012 Sigsbee Place, Washington, D. C.

THE DEPUTY COMMISSIONER: Washington, D. C.?

THE INTERPRETER: Yes.

THE DEPUTY COMMISSIONER: — is here to act as interpreter for the Claimant since the Claimant is unable to adequately understand and answer questions which will be propounded to him.

The request of Counsel for the Claimant for Mrs. [9] Fama to act as interpreter has the acquiescence of Mr. Halleck, Counsel for the Respondents.

* * *

CROSS EXAMINATION

[11] BY MR. HALLECK:

Q. Mr. Pistorio, where are you working now? A. For Mrs. Marjorie Merriweather Post May.

Q. Is that the Marjorie Merriweather Post May estate? A. Yes.

Q. When did you start working there? [12] A. June 1st, '62.

THE DEPUTY COMMISSIONER: June 1, 1962?

THE WITNESS: Yes.

BY MR. HALLECK:

Q. How much do you earn each week? A. $80 a week.

Q. $80 a week? A. Yes.

Q. That's when you work five days a week, is it? A. (Nodding head.)

* * *

Q. Many weeks you work six days a week, don't you?

THE INTERPRETER: Once in a while.

MR. HALLECK: Just once in a while?

THE INTERPRETER: Once in a while.

* * *

[16] Following an off-the record discussion, counsel for the Respondents has offered four pages of records from the employer, Mrs. Marjorie May, showing the earnings of Mr. Salvatore Pistorio for the week ending June 7th, 1962, through September 26th, 1963.

And Mr. Koonz, representing the claimant, has no objection and he is now going to make some comments.

All right, Mr. Koonz.

MR. KOONZ: I have no objection to the admission without formal proof to establish one thing, and that is for the periods indicated on those records, I will agree that that is the amount of salary which Mr. [17] Pistorio was paid during that period.

THE DEPUTY COMMISSIONER: It will be so received and marked Respondents' Exhibit A.

* * *

BY MR. HALLECK:

Q. Mr. Pistorio, do you generally receive $100 or $80 each week? A. Yes, yes.

* * *

[18] MR. KOONZ: Mr. Commissioner, I want to make this clear before we go any further that all I am agreeing to on the record is the total amount, the weekly record or the manner in which it was paid or the number of days Mr. Pistorio worked —

THE DEPUTY COMMISSIONER: All right.

Proceed.

BY MR. HALLECK:

Q. Mr. Pistorio, tell us what type of work you do there. A. Just sweep the walk, it's an easy job.

THE INTERPRETER: He sweeps, he says, and he tends the walks where the flowers grow.

* * *

[19] THE INTERPRETER: He kneels down to pull up weeds by the walks and he sweeps.

BY MR. HALLECK:

Q. Do you plant flowers?

THE INTERPRETER: A little bit on the walk.

He can almost express himself. I didn't know he was that good.

BY MR. HALLECK:

Q. Do you trim rose bushes?

(THROUGH THE INTERPRETER)

A. Yes, sometimes.

Q. Do you paint furniture? A. No.

Q. You say you do not paint lawn furniture? A. No.

Q. Never? A. No, never.

Q. Now, Mr. Pistorio, since you have been receiving compensation from Liberty Mutual, where else have you worked besides the Marjorie May estate?

THE INTERPRETER: No place, he has not worked any place else.

MR. HALLECK: You have never done any work at any other place?

[20] THE INTERPRETER: No.

MR. HALLECK: You have never done any work in any restaurant?

THE INTERPRETER: No, no.

THE DEPUTY COMMISSIONER: Since August 20, 1962, ask him.

(Interpreter relaying question.)

THE INTERPRETER: Just with Mrs. May.

MR. HALLECK: Do you know the Agnes Florist Shop.

THE INTERPRETER: He said he tried to learn the flower business, but his back hurt him and he couldn't take it up.

MR. HALLECK: Now he didn't say his back hurt him, did he, Mrs. Fama?

THE INTERPRETER: He said he couldn't pick it up because — can't you tell the way he talks? — because he means he was in agony —

THE DEPUTY COMMISSIONER: Mrs. Fama, merely repeat for the Reporter what he says.

* * *

[21] MR. HALLECK: Mr. Pistorio, did you go see Dr. Horwitz on or about July 6th, 1962 —

THE INTERPRETER: Yes.

MR. HALLECK: — about your back? At that time did you tell him what type of work you were doing?

THE INTERPRETER: Yes, sir.

MR. HALLECK: Did you tell him how many hours a day you worked?

THE INTERPRETER: He thinks he might have.

THE DEPUTY COMMISSIONER: We are at a hearing on an application to review an order filed on August 20, 1962.

That order is completely final. Let's have no evidence about anything which occurred prior to August 20, 1962.

MR. HALLECK: If I may make a proffer, Mr. [22] Commissioner.

* * *

Q. Did you go to see Dr. Horwitz on August 21, 1962?

THE DEPUTY COMMISSIONER: You ask him the question.

THE INTERPRETER: Yes, he did.

MR. HALLECK: At that time is it not a fact that you told the Doctor that you were continuing to work, as before, at the flower shop?

MR. KOONZ: Objection.

THE DEPUTY COMMISSIONER: Just a moment.

MR. KOONZ: It's his witness, Mr. Commissioner, and it is certainly leading.

He can find out what Mr. Pistorio told the Doctor, but I certainly object to this line of questioning. I think it is improper.

THE DEPUTY COMMISSIONER: Overruled.

THE INTERPRETER: He said the Doctor asked him, Are you working? And he said he tried to fix the flowers.

* * *

[23] MR. HALLECK: Did you tell him at that time that [24] you were working as a gardener?

THE INTERPRETER: Yes.

MR. HALLECK: Did you see Dr. Horwitz on January 15, 1963?

THE INTERPRETER: Yes.

MR. HALLECK: Did you tell him at that time you were continuing in your present occupation?

THE INTERPRETER: Yes. Same place.

THE DEPUTY COMMISSIONER: Ask him where he told the Doctor he was a gardener.

Let him answer you.

(Interpreter relaying question.)

THE INTERPRETER: Marjorie Post.

THE DEPUTY COMMISSIONER: The same place where he started to work? Is it the same place where he started to work some time in June of 1962, ask him.

THE INTERPRETER: (After relaying question to witness) Yes.

* * *

[28] MR. HALLECK: Now, Mr. Pistorio, where did you work last before you went to work for Mrs. May?

THE INTERPRETER: He said he worked for Troiano before he got hurt.

MR. HALLECK: How much did you earn per week from Troiano?

THE INTERPRETER: $80.

* * *

MR. HALLECK: Mr. Pistorio, do you have a yard at the house where you now live?

THE INTERPRETER: Yes, he does.

MR. HALLECK: Who cuts the grass?

THE INTERPRETER: His wife.

MR. HALLECK: Who does the gardening?

THE INTERPRETER: They both do.

MR. HALLECK: Mr. Pistorio, to go back to your work for Mrs. May, would you tell us, if you will, what type of work you would do on an average, what sort of things you do.

THE INTERPRETER: He says he sweeps and he pulls up weeds around the garden.

[29] MR. HALLECK: Does he do anything else besides sweep?

THE INTERPRETER: No.

MR. HALLECK: Does he work in the greenhouse?

THE INTERPRETER: Does he work in the greenhouse?

MR. HALLECK: Yes.

THE INTERPRETER: No.

MR. HALLECK: Never?

THE INTERPRETER: Never.

MR. HALLECK: Now, in regard to this sweeping, is that sweeping with a broom on sidewalks and walkways?

THE INTERPRETER: Yes, with a broom.

MR. HALLECK: A pushbroom?

THE INTERPRETER: No, a regular broom.

THE DEPUTY COMMISSIONER: Let him answer -- we're getting confused, because when I go to read the record, I won't know who's talking.

When Mr. Halleck or Mr. Koonz or I ask him a question, be sure and tell him now to wait until you ask him, then answer you in Italian.

(Interpreter explaining to witness.)

Does he understand now?

THE INTERPRETER: Yes.

MR. HALLECK: Do you ever water any flowers?

THE INTERPRETER: Sometimes he does.

[30] MR. HALLECK: Do you handle the sprinklers and the sprinkling system in this watering?

THE INTERPRETER: No sprinklers.

MR. HALLECK: In the wintertime when the snow is on the ground and you can't work outside, what kind of work do you do?

THE INTERPRETER: He says he washes pots and sweeps inside; flower pots, that is.

* * *

[31] MR. KOONZ: I won't be very long.

Mr. Pistorio, can you describe for us in detail the type of work you were doing at the time of and prior to the date you were hurt?

MR. HALLECK: I object on the ground that that goes behind the order --

MR. KOONZ: If the Commissioner please, I think it is necessary for defense of this modification to establish the type of work Mr. Pistorio did before he got hurt and the type of work he can do and is doing now.

THE DEPUTY COMMISSIONER: Objection sustained.

MR. KOONZ: Mr. Pistorio, can you tell us --

THE DEPUTY COMMISSIONER: Let's go off the record.

(Discussion off the record.)

Back on the record.

All right, proceed.

MR. KOONZ: Can you tell us in detail, Mr. Pistorio, precisely and exactly how -- the manner in which you do your work today.

THE DEPUTY COMMISSIONER: Let the record show that the witness got up from the witness chair and kneeled to the floor; indicating the nature of the work he did with his hands, Mrs. Fama?

THE INTERPRETER: Yes. He says he has to stoop [32] because he can't do it standing like other people; he has to crawl on the ground.

That's what he said.

THE DEPUTY COMMISSIONER: Mrs. Fama, ask Mr. Pistorio is the work that he does now heavier or lighter than the work as a tile setter's helper?

THE INTERPRETER: It's easier now.

THE DEPUTY COMMISSIONER: All right.

MR. KOONZ: Do you do any hard or strenuous work at all?

THE INTERPRETER: No.

MR. KOONZ: Is the majority --

THE DEPUTY COMMISSIONER: Tell the reporter what he said.

THE INTERPRETER: He said if he could work he would work extra hours, but he can't.

THE DEPUTY COMMISSIONER: All right.

Why can't he work? Ask him.

THE INTERPRETER: He says it's because of his back and his neck, and I never heard about his neck, but he says his neck hurts too.

THE DEPUTY COMMISSIONER: Ask him if he wears his back brace.

THE INTERPRETER: He has it on now.

THE DEPUTY COMMISSIONER: Does he have it on him [33] when he works?

THE INTERPRETER: Yes.

THE DEPUTY COMMISSIONER: Does he wear it in order for it to relieve his pain, when he has pain?

THE INTERPRETER: Not always.

THE DEPUTY COMMISSIONER: All right.

MR. KOONZ: How many braces have you had since this accident in 1960?

THE INTERPRETER: How many what? I didn't understand.

THE DEPUTY COMMISSIONER: Braces.

MR. KOONZ: How many braces have you had, Mr. Pistorio, since the accident in March of 1960?

THE INTERPRETER: He wears the same kind of brace, but I don't know what you mean by how many.

MR. KOONZ: Is this one -- this is the brace that he was first --

THE INTERPRETER: The original.

MR. KOONZ: Has it been replaced?

THE INTERPRETER: It's the same one.

MR. KOONZ: What can you not do now that you could do before the accident?

THE INTERPRETER: He cannot lift anything.

MR. KOONZ: Does your present work require you to stand for any length of time?

[34] THE INTERPRETER: He says it could be done standing up, but he kneels because he is more comfortable in that position.

MR. KOONZ: Is the majority of your time at work spent on your hands and knees?

THE INTERPRETER: He moves around both ways, he says.

MR. KOONZ: Since August --

THE DEPUTY COMMISSIONER: August 20, 1962?

MR. KOONZ: The date of the award, Mr. Commissioner. That's what I'm searching for.

THE DEPUTY COMMISSIONER: Since August 20, 1962.

MR. KOONZ: Since August 20, 1962, has your physical condition changed in any way in your opinion?

THE INTERPRETER: The same, he says. It's been the same.

MR. KOONZ: Are you seeing a doctor or getting any medical treatment now as a result of this accident in 1960?

THE INTERPRETER: Yes, he is.

MR. KOONZ: Can you explain --

THE DEPUTY COMMISSIONER: Go ahead. He was going to say something.

(Witness explaining to Interpreter.)

THE INTERPRETER: He says he goes twice a week [35] but this week he didn't go. He hasn't had time.

MR. KOONZ: You go twice a week for what?

THE INTERPRETER: For the back and for the neck pain.

* * *

[36] MR. KOONZ: When was the last time you saw Dr. Horwitz, if you know, approximately?

THE INTERPRETER: Two or three months ago.

MR. KOONZ: Two or three months ago were you taking these weekly treatments at Washington Hospital Center?

THE INTERPRETER: Yes.

MR. KOONZ: Did Dr. Horwitz tell you to stop the treatments?

THE INTERPRETER: No. Sometimes he feels it's hopeless to go.

MR. KOONZ: The last time you saw Dr. Horwitz did Dr. Horwitz say for you to stop getting the treatments at the Hospital Center?

THE INTERPRETER: He didn't say that.

THE DEPUTY COMMISSIONER: Did the Doctor tell him to continue to wear the brace, the back brace?

THE INTERPRETER: Yes.

THE DEPUTY COMMISSIONER: All right.

MR. KOONZ: Was there a time within the last year or year and a half that you attempted to work in a flower shop?

* * *

[37] MR. KOONZ: Since August 20, 1962, have you tried to work for a florist shop?

THE INTERPRETER: No. * * *

[45] THE DEPUTY COMMISSIONER: Dr. Horwitz is here as a witness for respondents.

Whereupon NORMAN HORWITZ

was called as a witness by and on behalf of respondents and having first been duly sworn by the Deputy Commissioner was examined and testified as follows:

THE DEPUTY COMMISSIONER: Any questions on the qualifications of Dr. Horwitz, Mr. Koontz?

[46] MR. KOONTZ: I know he is a neurosurgeon and I have no questions.

THE DEPUTY COMMISSIONER: Let the record show that Dr. Horwitz is known to me as a specialist in neuro-surgery. * * *

DIRECT EXAMINATION

BY MR. HALLACK:

Q. Doctor, do you know Mr. Salvatore Pistorio? A. I do.

Q. And has he been a patient of yours? A. He has.

Q. When did he first come to you, and what were his complaints? A. I first examined Mr. Pistorio on 13 April 1960. His complaints at that time were: low back and right lower extremity pain which had been present for two weeks dating from an injury at work when he lifted a heavy slab of marble.

Q. What did you find -- Let me say this.

I presume you examined Mr. Pistorio? A. I did.

Q. What did you find upon your examination? A. The examination indicated some tilting of the spine to the left. There was muscle spasm and limitation of [47] forward bending and some straightening of the normal lumbar curve.

There was pain when the spine was extended.

The straight-leg raising was restricted at 50 degrees on the right.

* * *

[48] MR. HALLECK: Doctor, then let us come up to a report dated August 21, 1962.

Did you see Mr. Pistorio on or about August 21, 1962? A. I have a record of having seen him on 21 August 1962.

Q. Now, at that time, Doctor, what was the result of your examination of Mr. Pistorio? A. He had been complaining of stiffness in the back and some aching in the left lower extremities. He had also had some neck pain, which had disappeared, and was felt to be on an arthritis basis, unrelated to the injury.

Examination of his back revealed that he had limitation of forward bending, but this represented a problem because throughout, and I think this will be borne out by my reports, you can ask the patient to bend but if the patient states he can't bend and yet you have him lie down on the back and you can raise his legs up to almost 90 degrees, the only thing you assume is that the element of cooperation here is something less than 100 percent.

I was unable to find anything impressive in the examination, other than some back restriction but not certainly the degree that was alleged. [49] Q. From that time on, Doctor, have you had occasion to examine him again, and, if so, when? A. I examined him again in November of 1962 and other than some sensory changes which were not of a distribution that would indicate an anatomical relationship, that is, the numbness was up to the groin, which could not be explicable on an anatomical knowledge of the distribution of these nerves, I found no change from the previous examination.

Q. Doctor, how do you determine this numbness? A. This is a subjective complaint which may be valuable if it happens to follow a discrete nerve pattern; that is, there are autonomous areas of innervation that we are familiar with.

For instance, the tip of the fifth finger and the top of the great toe. These are areas that — whose distribution is known to be anatomical and it helps us distinguish between those.

But when a patient complains of numbness up to the groin, this is several levels above any area of injury or surgery and could not be explained on an anatomical basis.

Q. And all you really have then is the fact that the patient himself says that this is so? A. Yes, that's correct.

* * *

[50] Q. Did you then see him again in January of 1963, Doctor? A. Yes — No, I saw him February — Let's see. Did I see him in January? Yes, I saw him on 15 January.

Q. And again on February 18, 1963? A. Yes, that's correct. At that time he had complaints of his neck and — which I again did not feel was related to his injury — and I referred him to the Washington Hospital Center Out-patient Department for their evaluation.

They subsequently did take x-rays which confirmed my impression that he had cervical arthritis and —

Q. Was that cervical arthritis something that would be expected to occur independently of any injury he might have sustained? A. I can see no relationship between this and his low back.

* * *

[51] Q. What did you find in your May 3, 1963 examination, Doctor? A. My impression was: I see no change of this man's condition. He again had the same problem in evaluating the back and he had some restriction of head motion, but in other respects there was no essential change.

Q. Did you examine him on October the 30th 1963? A. I did.

Q. Would you tell us, Doctor, with some detail what the result of this examination was? What were the findings and what were your impressions? A. This was the last time that I examined him, which was on 30 October of this year. He had stated he had been working regularly as a gardener. He had back pain, neck pain, and numbness in the lower extremities. He continued to wear the back support. He had not been taking any medication. He had also had some previous elbow difficulty which had improved. Then he had the x-ray report of the Washington Hospital Center on his neck which showed arthritis.

Again, we found this problem in examining his back. [52] The patient would not bend more than 5 degrees, and yet when he was lying down we raised his legs and there was no problem in straight-leg raising, which is incompatible with the anatomical situation.

There were no other changes, and the loss of sensation up to the groin was again alleged, and it was my impression — I see no basic change in this individual. I believe his neck problem is due to cervical

arthritis and is borne out by the x-rays. I do not believe it is in any way related to his injury. The sensory findings are without anatomical explanation and must be assumed to be functional. The fact that the straight-leg raising can be accomplished indicates that this man can bend considerably more than he is willing to admit.

As stated previously, I believe he can work and as stated in previous reports I do not think his permanent disability exceeds for the body as a whole 15 per cent.

Q. And this is your impression, is it, Doctor, of his disability as a result of his low back injury for which the award was made? A. It is.

* * *

[53] CROSS EXAMINATION (By Mr. Koonz)

[55] Q. Did you take a history from him at any time which indicated at any time prior to the accident he was having neck or upper back or cervical spine complaints or pain? A. I wonder if you would clarify your question as to date?

Q. When you took a history -- A. Originally?

Q. The initial history. * * *

[56] [A] He denied previous back trouble or other serious illnesses, so I have no knowledge of previous neck difficulties, based on my initial examination.

* * *

Q. During the course of your examination and followup of Mr. Pistorio since his accident, when was the first time that you became aware of cervical pain? A. My first note indicates July 6, 1962, * * *

[57] Q. Doctor, at this particular time, on the date that you have just referred to — A. That's correct.

Q. — was Mr. Pistorio at that time wearing a brace in the low back, a low back brace? A. I have no record of that. My recollection is that every time he did come in he was wearing a support. This is the best of my — I don't make notations unless there is some change. I don't have a record of that dat4 whether he was wearing it or not.

Q. Do you know when he began to wear it? A. The back support?

Q. Yes. A. Oh, early on, well before this, I'm sure, but I cannot give you the —

Q. Would it be fair to say that it was within a matter of weeks after the accident? A. Not weeks but — Well, he may have had one prior to treatment. My records — I probably — Let me just see. I'll review them and I'll see if I can (consulting records.) —

[58] He was furnished with one after surgery, that I am certain of.

Q. Did he have one prior to surgery? A. Not by me. I don't know whether — I see a note here from Dr. Becker saying that it was the opinion of the attending physician that he would benefit from the wearing of a back support and this is post-op and he was accordingly furnished with one. But there is no date on that, either.

Q. Did you concur in that opinion? A. Oh, yes.

Q. And, as a matter of fact, Doctor, there never has been a time since this back brace was first prescribed that there was any indication, as far as you were concerned, that it be removed. Is that correct? A. Well, there was some reason for that, but — which I haven't entered into here. We prefer to avoid back supports if we can get a man on an exercise program, and this is a whole other area that we could discuss at some length.

Q. Well, did you tell him not to wear his brace, or that he did not need it? A. No. We did not.

Q. And on each occasion that he entered your office [59] he had the brace on? A. To my recollection. I don't have notes to that effect.

Q. Is not this brace itself to a degree a disabling factor? In other words, the use of it? A. No, I've got many men who are doing complete — that is, have returned to their heavy work wearing a back support. They feel a little bit better about it. I have any number of men who —

Q. Does this not though generally restrict the back motion in and of itself? A. It depends, of course, what you are doing. It's not as free as if you didn't, but in a person who alleges he can't bend anyway, I can't see that it does offer any restriction.

Q. My question is, does it in and of itself? A. You'll have to specify the individual and the circumstances. If it's to do office work, certainly not; if it's to do any number of things where you may not be doubled up in a knot, it wouldn't have any effect on it.

Q. Well, the fact is that the man, Mr. Pistorio, has been wearing a brace for some time and that you yourself did not suggest to him that he remove it. A. That is correct.

Q. Doctor, you have indicated in your testimony that [60] for a considerable period of time you have found no real apparent change in his condition. He seems to be approximately the same, at least for the last year and a half. Would that be a correct statement? A. There has been waxing and waning of his neck symptoms, but his low back has been essentially unchanged.

Q. Doctor, referring to your report, which we do have a copy of, dated February 18, 1963, and reminding you or suggesting that you have testified that August of 1962 you could not find anything terribly wrong with Mr. Pistorio, your impression was that he was not 100 per cent cooperative, and that a lot of his subjective complaints were inconsistent with what you found. Is that correct? A. That's correct.

Q. Doctor, referring to this report of February 18th, I call your attention to the statement made in it wherein you indicate that Mr. Pistorio again shows marked limitation of forward bending.

You do indicate there is no spasm or discrete tenderness. However, there is no indication that this is a binary type of restriction.
A. Again referring to these reports, when you get down to the extremities, straight-leg raising is not restricted. My reports so stated this right along, that * * *

[66] Q. That's the point, Doctor. He apparently had asymptomatic arthritis prior to this incident, didn't he, to the best that you can determine?
A. I don't know when the spurs came there. He had no complaint of his neck. He complained two and half, two plus years after the injury of neck pain. I have no way of knowing how long its been there. It has been more than a few months, I would assume.

* * *

[69] Q. Doctor, do you have any idea what type of work Mr. Pistorio is doing now? A. Now, he told me he was gardening. I don't know the details.

Q. That's just your general impression? A. He says he works as a gardener.

[70] Q. Do you know what he was doing before he was injured? A. Well, he was a marble worker, it was a rather skilled job entailing, I'm not sure just what he was doing, but he was a stone masion, perhaps. I'm not —

Q. Were you aware that this entails lifting stone, sometimes heavy objects and might involve heavy objects? A. Oh, yes, yes.

Q. Doctor, in your opinion, could Mr. Pistorio be doing this type of work, that is, the type of work he was doing when he got hurt, on a regular basis today? A. I don't think — If you want to put a weight limit, you'll have to tell me more about the job. I think that anything up to 20 or 30 pounds he could; beyond that, I think he probably would enter into difficulty. I don't know.

As you say, I don't know specifically regarding the weight restrictions or the weight requirements of his job.

Q. In any type of work that Mr. Pistorio does, would he not be quite limited in any type of strenuous activity? A. Well, I think you would have to qualify that again. I mean — Obviously, you're not referring to a sedentary office job.

[71] Q. Yes. A. Good. I think there are many types of outside work that one could do. I think heavy lifting is the main restriction on this man, based upon what I know about him. * * *

STUART L. LOY

was called as a witness by and on behalf of the Respondents and having first been duly sworn by the Deputy Commissioner was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your name and address.

THE WITNESS: Stuart L. Loy, my home address is 116 Buchanan Street, McLean, Virginia.

THE DEPUTY COMMISSIONER: All right, Mr. Koonz.

DIRECT EXAMINATION

BY MR. KOONZ:

Q. Mr. Loy, for how long has Mr. Pistorio been employed by you? A. Around two years.

Q. Can you tell me, sir, in what capacity? [72] A. What?

Q. In what capacity has he been employed? What type of work does he do? A. Well, it's very light work, garden work, watering, cleaning up, planting flowers, bulbs, and that.

Q. When he first came to you as an employee, were you aware of any injury or condition or limitation that he had? A. He said he had a bad back.

Q. In light of that fact, was that why you gave him this type of work that he is doing? A. Well, yes. We do have — well, that is the most. It's all the same type of work, you know.

Q. Can you describe his work in terms of the nature of his duties; that is, are they strenuous, are they light work, or moderate duties and so on? A. I would say just moderate, nothing heavy, lifting or anything

like that. It's all, as I say, watering or raking leaves, clean up paths, planting bulbs, flowers, things like that.

Q. Does he do any heavy work? A. No.

Q. During the course of his employment with you, have you been aware that he has been under medical care? A. Yes. He gets off half a day or something like that [73] when he tells me he's going to clinic, you know, for a checkup.

Q. About how often does this occur? A. Practically every week he goes.

* * *

[74] Q. In the period of time since he's been there, have you noticed any change in his condition? A. No, I can't see any change in him.

Q. Has he undertaken any more strenuous work since he's been there? A. No, roughly the same thing all the time.

Q. The same thing. A. Roughly the same routine, yes.

* * *

JAMES H. MASTERSON

[82]
was called as a witness by and on behalf of the Claimant and, having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Please give the reporter your full name and address, Doctor.

THE WITNESS: Dr. James Hugh Masterson, Anderson Clinic, Arlington, Virginia.

* * *

THE DEPUTY COMMISSIONER: Let the record show that Dr. Masterson has appeared before me in other hearings and is known to me as a specialist in orthopedic surgery.

All right, Mr. Gerel.

DIRECT EXAMINATION

BY MR. GEREL:

Q. Dr. Masterson, can you tell us from your records very briefly the occasions on which you saw Mr. Pistorio? A. I saw Mr. Pistorio —

THE DEPUTY COMMISSIONER: After August 20, 1962. We don't want anything prior to the filing of the order. There was an order here. After August 20, 1962.

[83] THE WITNESS: He was seen on November 13, 1963.

THE DEPUTY COMMISSIONER: All right.

BY MR. GEREL:

Q. All right. And on that occasion did you examine him? A. I did. At that time we reviewed our previous record. I should state at this time that we had a moderate amount of difficulty with this patient because of the severe language barrier and in spite of getting an Italian speaking nurse and so forth it was still extremely difficult to find out where the man was bothered.

However, we did ascertain that since I had seen him before he had not improved as far as his complaints regarding the neck and back were concerned, but he had been able to secure work as a gardener which he did mostly on his knees.

For this work he made between 70 and 80 dollars a week from which he said he supported a family of five.

Examination at that time showed marked spasm in the back. He was unable to bend forward without the muscle tightness and spasm increasing. He refused to turn his neck voluntarily to the left side, although he did turn it to the right without much difficulty.

I could obtain reflexes at both knees but not at [84] either ankle, and I felt that he had not changed in his disability from my previous examination of August 30, 1961.

Q. What percentage of disability, Doctor, were you considering when you say that he had not changed? A. At that time I rated him as

having a 50 per cent permanent partial disability and my note of November 13th 1963 stated that the disability rating still stood.

* * *

[86] THE DEPUTY COMMISSIONER: * * * Dr. Masterson, so you can have the benefit of the reason why we are here, Mr. Pistorio was working when he was injured in 1960 as a tile setter's helper and while working as a tile setter's helper and lifting a bag of cement that was how he was injured.

Since the injury the claimant, Mr. Pistorio, has testified through an interpreter that approximately June 1, 1962 he started working as a gardener.

* * *

[94] THE DEPUTY COMMISSIONER: The reason we are at this hearing and have been at this hearing since October of 1963 is that the parties had agreed informally for filing of an order, there was no hearing, the parties agreed, and this office filed a Compensation Order awarding compensation to Mr. Pistorio at a time when he was not working, claiming disability, and we found from a review of the medical reports that the disability he sustained was the rupture of a disc as I just described, which caused the development of a right inguinal hernia.

Now we are at these hearings because the employer [95] and the insurance carrier filed an application for review, as is the procedure, on the ground that the disability of Mr. Pistorio has decreased.

Now, medically speaking, Dr. Masterson, is Mr. Pistorio in your opinion 50 per cent disabled because of the residuals in November 1963 from the nature of the injury that I described to you, which is in my Compensation Order?

THE WITNESS: In my opinion it could be -- he could be 50 per cent disabled from the events as you describe them.

* * *

[Filed October 5, 1964]

[Plaintiff's Exhibit No. IV.]

SUPPLEMENTARY NEUROSURGICAL REPORT
PISTORIO, MR. SALVATORE
FEBRUARY 18, 1963

The patient returns for re-evaluation. Although his complaints in the low back and legs remain unchanged, he has been troubled again by neck and left upper extremity discomfort. The pain extends down to the left hand and also produces some numbness. The patient continues to wear his back support.

Examination of the Cervical Spine: reveals limitation of motion. There is tenderness in the lower cervical region. There is no demonstrable spasm. Extension and compression to the left reproduces the pain in the left upper extremity.

Examination of the Lumbosacral Spine: again shows marked limitation of forward bending. However, there is no spasm or discrete tenderness.

Motor Examination: reveals some weakness of the left triceps muscle.

Sensory Examination: reveals hypesthesia over the distribution of the C7 root in the index and middle fingers of the left hand. Sensory changes in the left leg persist.

Reflexes: reveal absence or marked depression of the left triceps jerk. Reflexes in the lower extremities cannot be elicited.

Extremities: Straight leg raising is not significantly restricted.

Impression: I see no change in his low back situation. Therefore, I see no reason to alter his disability rating. He has had a return of cervical root irritiation, involving the C7 root. This is probably related to an arthritic spur of the cervical spine. I cannot relate this to his low back injury.

Recommendation: This man would benefit from some neck stretching and hot packs and massage to the cervical region.

Norman H. Horwitz, M.D.

[Filed October 5, 1964]

[Plaintiff's Exhibit No. V.]

LIBERTY MUTUAL
Washington 6, D. C.

March 11, 1963

U. S. Department of Labor
Bureau of Employees Compensation
D. C. Workmens Compensation Act
Colonial Building
1156 15th Street, N. W.
Washington 25, D.C.

Attention: E. D. Woodworth, Claims Examiner

Re: Salvatore Pistorio — Antonio Troiano Tile and Marble Company, Inc. C360-118063 Your Case #15023-23

Dear Mr. Woodworth:

This is to apply for modification of the outstanding award on the above-captioned case dated August 20, 1962.

This application for modification of award is based on change in condition pertaining to a change in extent of disability as pointed out in Dr. Horwitz's report dated February 18, 1963.

In order to comply with your requirement that all material be submitted in duplicate with an application for modification of award I am enclosing one copy of Dr. Horwitz report dated February 18, 1963. The original of this report has already been forwarded to you and should already be in your file.

Your cooperation in this matter will be greatly appreciated.

Sincerely,

/s/ Allyn Myers,
Claims Representative

[Plaintiff's Exhibit No. VI.]

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act	
SALVATORE PISTORIO, Claimant	COMPENSATION ORDER
vs.	MODIFICATION OF AWARD
ANTONIO TROIANO TILE & MARBLE CO., INC., Employer	CASE NO. 15023-23
LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier	

On August 20, 1962, a compensation order was filed in the above-entitled case awarding to the claimant herein compensation for temporary total disability, 104 weeks at the rate of $54 per week, from April 1, 1960 to March 29, 1962, inclusive, amounting to $5,616; and for permanent partial disability, 20 weeks at the rate of $27 per week from March 30, 1962 to August 16, 1962, inclusive, amounting to $540, or a total of $6,156, and thereafter continuing payments of compensation for permanent partial disability at the rate of $27 per week, payable in bi-weekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner. The said compensation order is made a part hereof by reference.

On March 14, 1963, the employer and the insurance carrier filed application for modification and review of the award contained in the compensation order filed on August 20, 1962, on the ground of a change in conditions.

Such investigation in respect to the said application having been made as is considered necessary, and hearings having been duly held in conformity with law, and stipulations having been filed by the interested parties, the Deputy Commissioner makes the following additional

FINDINGS OF FACT

1. That in accordance with the terms of the compensation order filed on August 20, 1962, the employer and the insurance carrier have paid to the claimant herein compensation for temporary total and permanent partial disability to and including February 13, 1964, in the amount of $8,262;

2. That from March 30, 1962, to May 31, 1962, inclusive, 9 weeks the claimant sustained as a further result of the injury a permanent partial disability of 50 per cent, representing a reduction in his weekly wage-earning capacity from $81 to $40.50; and for such permanent partial disability under section 8(c) (21) of the Act, he is entitled to compensation at the rate of $27 per week (66-2/3 per cent of $40.50, the difference between the average weekly wages of $81 and the reduced weekly wage-earning capacity of $40.50), amounting to $243;

3. That the claimant's condition has improved; that since June 1, 1962, the claimant has worked as a gardener where he kneels down to pull up weeds, he sweeps walks and tends the walks where flowers grow and often trims the rose bushes;

4. That as a further result of the injury the claimant is continuing to experience pain in his back; that he continues to wear his back brace when he works; that such partial disability is permanent and the claimant is entitled to compensation therefor under section 8(c) (21) of the Act; that the claimant's average weekly earnings beginning June 1, 1962 have been in excess of his average weekly wages at the time of the injury, but that such wages do not fairly and reasonably represent his wage-earning capacity as diminished by the injury; that having due regard to the nature of the injury, the degree of physical impairment,

his usual employment and other factors which may affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under section 8 (h) of the Act at $68.85 per week, based on a 15 per cent permanent partial disability; that beginning June 1, 1962 he is entitled to compensation for such permanent partial disability at the rate of $8.10 per week (66-2/3 per cent of $12.15, the difference between his average weekly wage of $81 and reduced weekly earning capacity of $68.85); that accrued compensation due the claimant for temporary total and permanent partial disability to May 31, 1962, inclusive, amounts to $5,859, and that accrued compensation for permanent partial disability from June 1, 1962 to March 26, 1964, inclusive, 95 weeks at the rate of $8.10 per week, amounts to $769.50, or a total of $6,628.50.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Antonio Troiano Tile & Marble Co., Inc., and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant herein compensation as follows: For temporary total disability, 104 weeks at the rate of $54 per week from April 1, 1960 to March 29, 1962, inclusive, amounting to $5,616; for permanent partial disability, 9 weeks at the rate of $27 per week, from March 30, 1962 to May 31, 1962, inclusive, amounting to $243; and for permanent partial disability, 95 weeks at the rate of $8.10 per week, from June 1, 1962 to March 26, 1964, inclusive, amounting to $769.50, or a total of $6,628.50. The employer and the insurance carrier, having already paid the sum of $8,262, shall withhold payments of compensation until February 8, 1968, when the overpayment of $1,633.50 will have been exhausted, and $2.70 will be due and payable, and thereafter shall continue payments of compensation to the claimant for permanent partial disability at the

rate of $8.10 per week, in bi-weekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner.

A fee for additional legal services rendered the claimant in connection with this claim is approved in favor of Ashcraft and Gerel, Attorneys at Law, 925 15th Street, N. W., Washington, D.C., in the amount of $300, such sum to be a lien upon compensation now due the claimant and upon future installments of compensation which may become due him under this award.

Given under my hand and filed at Washington, D.C. this twenty-seventh day of March, 1964

/s/ Charles Einbinder
Deputy Commissioner
District of Columbia Compensation District

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, the attorneys for the claimant and the attorneys for the respondents, at the last known address of each as follows:

Name	Address
Mr. Salvatore Pistorio	10011 Woodland Drive Silver Spring, Maryland
Antonio Troiano Tile & Marble Co., INC	313 Kennedy Street, N. W. Washington, D. C.
Liberty Mutual Insurance Company	1730 M Street, N. W. Washington, D. C.
Ashcraft and Gerel Attorneys at Law	925 15th Street, N. W. Washington, D. C.
Hogan & Hartson Attorneys at Law	800 Colorado Building Washington, D.C.

/s/ Charles Einbinder
Deputy Commissioner

Mailed: March 27, 1964

[Filed, Nov. 20, 1964]

ORDER

Upon consideration of the motions for summary judgment filed herein by defendant, Charles Einbinder, Deputy Commissioner, and by the intervenors, Antonio Troiano Tile & Marble Co., Inc., and Liberty Mutual Insurance Company, together with the memoranda of points and authorities in support thereof and oral argument of counsel, and the Court having concluded that the findings of the deputy commissioner are supported by the record and that he is entitled to judgment as a matter of law, it is this day of November, 1964.

ORDERED that defendant's and intervenors' motions for summary judgment be and the same hereby are granted, and it is further

ORDERED that the complaint be and the same hereby is dismissed with prejudice.

Hart
District Judge

[Certificate of Mailing]

[Filed Dec. 21, 1964]

NOTICE OF APPEAL

Notice is hereby given this 21st day of December, 1964, that Salvatore Pistorio hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of November, 1964 in favor of defendant Charles Einbinder and intervenor Liberty Mutual Insurance Company against said Salvatore Pistorio.

Joseph H. Koonz, Jr.
Attorney for Plaintiff

[Service]

BRIEF FOR APPELLEE EINBINDER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19152

SALVATORE PISTORIO, APPELLANT,

v.

CHARLES EINBINDER, Deputy Commissioner, U. S. Department of Labor, Bureau of Employees' Compensation, *et al.*, APPELLEES.

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

CHARLES T. DUNCAN,
Principal Assistant United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.
Attorneys for Appellee Einbinder

CHARLES DONAHUE,
Solicitor of Labor.

ALFRED H. MYERS,
GEORGE M. LILLY,
Attorneys, U.S. Department of Labor,
Of Counsel.

QUESTIONS PRESENTED

In the opinion of appellee Einbinder, the questions presented are whether the record, considered as a whole, supports the deputy commissioner's finding that for the period from and after June 1, 1962 claimant's permanent partial disability had diminished to a fifteen per cent loss of earning capacity, thereby warranting a retroactive modification of an earlier award of workmen's compensation benefits.

INDEX

TABLE OF CONTENTS

	Page
Counterstatement of Case	1
The Compensation Order	3
Summary of Argument	5
Argument:	
I. The deputy commissioner's finding that claimant's permanent partial disability from and after June 1, 1962 was but 15 per cent is supported by the record considered as a whole	6
II. The deputy commissioner's modification order awarding compensation retroactively from June 1, 1962 was in accordance with law	13
Conclusion	17

TABLE OF CASES

Anderson v. *Hoage*, 63 App. D.C. 169, 70 F.2d 773 (1934)	9
Associated General Contractors v. *Cardillo*, 70 App. D.C. 303, 106 F.2d 237 (1939)	11
Baltimore & O. R. Co. v. *Clark*, 56 F.2d 212 (Md. 1932)	12
**Bethlehem Shipbuilding Corporation* v. *Cardillo*, 102 F.2d 299, (C.A. 1, 1939)	6, 14
Burley Welding Works, Inc. v. *Lawson*, 141 F.2d 964 (C.A. 5, 1944)	9
Cardillo v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947)	7, 9
Charleston Shipyards v. *Lawson*, 227 F.2d 110 (C.A. 4, 1955)	9
Contractors PNAB v. *Pillsbury*, 150 F.2d 310 (C.A. 9, 1945)	8, 12
Crescent Wharf & Warehouse Company v. *Cyr*, 200 F.2d 633 (C.A. 9, 1952)	8, 9, 12
Del Vechhio v. *Bowers*, 296 U.S. 280 (1935)	8, 9
Eastern S.S. Lines v. *Monahan*, 26 F.Supp. 944 (Me. 1939)	9
**General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958)	6, 8
Gooding v. *Willard*, 209 F.2d 913 (C.A. 2, 1954)	9, 11, 12
Gulf Oil Corporation v. *McManigal*, 49 F.Supp. 75 (W.Va. 1943)	9
Hampton Roads Stevedoring Corp. v. *O'Hearne*, 184 F.2d 76 (C.A. 4, 1958)	12

Cases—Continued

	Page
Hudnell v. *O'Hearne*, 99 F.Supp. 954 (Md. 1951)	11
Jarka Corporation of Philadelphia v. *Norton*, 56 F.2d 287 (Pa. 1930)	12
John W. McGrath Corp. v. *Hughes*, 289 F.2d 403 (C.A. 2, 1961)	11, 12
Kwasizur v. *Cardillo*, 175 F.2d 235 (C.A. 3, 1949), *cert. den.*, 338 U.S. 880	11
Liberty Mutual Insurance Co. v. *Britton*, 100 U.S. App. D.C. 236, 243 F.2d 659 (1957)	8
Liberty Mutual Insurance Co. v. *Gray*, 137 F.2d 926 (C.A. 9, 1943)	8
Liberty Mutual Insurance Co. v. *Marshall*, 57 F.Supp. 177 (Wash. 1944), *aff'd*, 151 F.2d 1007 (C.A. 9, 1945)	12
Liberty Stevedoring Co. v. *Cardillo*, 18 F.Supp. 729 (N.Y., 1937)	12
Lowe v. *Central Ry. Co. of N.J.*, 113 F.2d 413 (C.A. 3, 1940)	8
Marine Operators v. *Barnhouse*, 61 F.Supp. 572 (Ill., 1944)	12
National Lead Co. v. *Kingsland*, 74 F.Supp. 985 (D.C., 1948)	9
**O'Keeffe* v. *Smith, Hinchman & Grylls*, —— U.S. ——, decided 3/29/65 (not yet reported), 33 L.W. 3320	6, 7, 13
**O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951)	6, 8, 9, 13
Pan American Airways v. *Willard*, 99 F.Supp. 257 (N.Y., 1951)	9
Parker v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941)	9
**Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961)	6, 8, 9
Ryan Stevedoring Co. v. *Norton*, 50 F.Supp. 221 (Pa., 1943)	12
Sentilles v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959)	12
South Chicago Coal & Dock Co. v. *Bassett*, 309 U.S. 251 (1940)	9
Southern Stevedoring Co. v. *Henderson*, 175 F.2d 863 (C.A. 5, 1949)	9
**The Jarka Corporation* v. *Hughes*, 299 F.2d 534 (C.A. 2, 1962)	6, 14
Todd Shipyards Corp. v. *Donovan*, 300 F.2d 741 (C.A. 5, 1962)	12
United States Fidelity & Guaranty Co. v. *Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951)	8, 9
Voris v. *Eikel*, 346 U.S. 328 (1953)	9
Walsh Stevedoring Co. v. *Henderson*, 203 F.2d 501 (C.A. 5, 1953)	9
Wilson & Co. v. *Locke*, 50 F.2d 81 (C.A. 2, 1931)	11
Wolff v. *Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964)	8

Cases—Continued Page

Zurich General Accident & Liability Ins. Co. Ltd. v. *Marshall*, 42 F.2d 1010 (Wash., 1930) 12

STATUTES

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*; 45 Stat. 600, D.C. Code 36-501 ..... 1, 6, 12, 14

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19152

SALVATORE PISTORIO, APPELLANT

v.

CHARLES EINBINDER, Deputy Commissioner, U. S. Department of Labor, Bureau of Employees' Compensation, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE EINBINDER

COUNTERSTATEMENT OF THE CASE

This cause arose upon an action instituted by appellant, plaintiff below, to review and set aside as not in accordance with law a compensation order filed by appellee Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on March 27, 1964, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, and as made applicable to the District of Co-

lumbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code, 36-501. In that order, the deputy commissioner found that claimant's physical condition had so improved (as evidenced by work performed by appellant, hereinafter referred to as "claimant" or "employee") as to warrant modification of a compensation order filed earlier, namely, on August 20, 1962.

The original order had been issued without a hearing following agreement of the parties as to the extent of claimant's then disability as shown by medical reports. Pursuant thereto the deputy commissioner found that claimant, as the result of an employment injury of March 31, 1960, had sustained temporary total disability during the period from April 1, 1960 to March 29, 1962, and a 50 per cent permanent partial disability for the period thereafter.

Subsequently, upon application of claimant's employer and its insurance carrier, for modification of the August 20, 1962 order predicated upon a showing of claimant's increased working capacity as a result of physical improvement, the deputy commissioner, upon evidence presented to him at a formal hearing, issued the order now under review. In this order the deputy commissioner now found that from June 1, 1962 claimant's permanent partial disability was 15 per cent, instead of the 50 per cent previously found on August 20, 1962.

The claimant took issue with this modification, in effect contending in his complaint that the record did not contain evidence to support the deputy commissioner's modification of his prior order, and that the modification should not have been made retroactive to a date some six or seven weeks prior to the filing of the original order.

To the complaint, the deputy commissioner filed a motion for summary judgment. Upon review of the record, the court below sustained the deputy commissioner's findings, granted the deputy commissioner's motion, and dismissed the complaint. This appeal followed.

THE COMPENSATION ORDER (MODIFICATION OF AWARD)

The compensation order complained of reads, in pertinent part, as follows:

> On August 20, 1962, a compensation order was filed in the above-entitled case awarding to the claimant herein compensation for temporary total disability, 104 weeks at the rate of $54 per week, from April 1, 1960 to March 29, 1962, inclusive, amounting to $5,616; and for permanent partial disability, 20 weeks at the rate of $27 per week from March 30, 1962 to August 16, 1962, inclusive, amounting to $540, or a total of $6,156, and thereafter continuing payments of compensation for permanent partial disability at the rate of $27 per week, payable in biweekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner. The said compensation order is made a part hereof by reference.
>
> On March 14, 1963, the employer and the insurance carrier filed application for modification and review of the award contained in the compensation order filed on August 20, 1962, on the ground of a change in conditions.
>
> Such investigation in respect to the said application having been made as is considered necessary, and hearings having been duly held in conformity with law, and stipulations having been filed by the interested parties, the Deputy Commissioner makes the following additional

FINDINGS OF FACT

> 1. That in accordance with the terms of the compensation order filed on August 20, 1962, the employer and the insurance carrier have paid to the claimant herein compensation for temporary total and permanent partial disability to and including February 13, 1964, in the amount of $8,262;
>
> 2. That from March 30, 1962, to May 31, 1962, inclusive, 9 weeks, the claimant sustained as a furth-

er result of the injury a permanent partial disability of 50 per cent, representing a reduction in his weekly wage-earning capacity from $81 to $40.50; and for such permanent partial disability under section 8 (c) (21) of the Act, he is entitled to compensation at the rate of $27 per week (66⅔ per cent of $40.50, the difference between the average weekly wages of $81 and the reduced weekly wage-earning capacity of $40.50), amounting to $243;

3. That the claimant's condition has improved; that since June 1, 1962, the claimant has worked as a gardner where he kneels down to pull up weeds, he sweeps walks and tends the walks where flowers grow and often trims the rose bushes;

4. That as a further result of the injury the claimant is continuing to experience pain in his back; that he continues to wear his back brace when he works; that such partial disability is permanent and the claimant is entitled to compensation therefor under section 8 (c) (21) of the Act; that the claimant's average weekly earnings beginning June 1, 1962 have been in excess of his average weekly wages at the time of the injury, but that such wages do not fairly and reasonably represent his wage-earning capacity as diminished by the injury; that having due regard to the nature of the injury, the degree of physical impairment, his usual employment and other factors which may affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally extend into the future, the claimant's wage-earning capacity is, in the interest of justice, fixed under section 8 (h) of the Act at $68.85 per week, based on a 15 per cent permanent partial disability; that beginning June 1, 1962 he is entitled to compensation for such permanent partial disability at the rate of $8.10 per week (66⅔ per cent of $12.15, the difference between his average weekly wage of $81 and reduced weekly earning capacity of $68.85); that accrued compensation due the claimant for temporary total and permanent partial disability to May 31, 1962, inclusive, amounts to $5,859, and that accrued compensation for perm-

anent partial disability from June 1, 1962 to March 26, 1964, inclusive, 95 weeks at the rate of $8.10 per week, amounts to $769.50, or a total of $6,628.50.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Antonio Troiano Tile & Marble Co., Inc., and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant herein compensation as follows: For temporary total disability, 104 weeks at the rate of $54 per week from April 1, 1960 to March 29, 1962, inclusive, amounting to $5,616; for permanent partial disability, 9 weeks at the rate of $27 per week, from March 30, 1962 to May 31, 1962, inclusive, amounting to $243; and for permanent partial disability, 95 weeks at the rate of $8.10 per week, from June 1, 1962 to March 26, 1964, inclusive, amounting to $769.50, or a total of $6,628.50. The employer and the insurance carrier, having already paid the sum of $8,262, shall withhold payments of compensation until February 8, 1968, when the overpayment of $1,633.50 will have been exhausted, and $2.70 will be due and payable, and thereafter shall continue payments of compensation to the claimant for permanent partial disability at the rate of $8.10 per week, in biweekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner.

SUMMARY OF ARGUMENT

The evidence in the record considered as a whole clearly supports the deputy commissioner's present finding that as of June 1, 1962, claimant's permanent partial disability had been reduced to but 15 per cent, thereby warranting modification of a prior award of compensation filed August 20, 1962 without notice to the deputy commissioner however of claimants intervening improvement that June.

Thus supported, the Court below correctly concluded that the deputy commissioner's finding of an improvement in claimant's condition with a consequent increase in earning power should be accepted upon judicial review. *O'Keeffe* v. *Smith, Hinchman & Grylls*, —— U.S. ——, decided March 29, 1965 (not yet reported), 33 L.W. 3320; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958). And, in view of the express provisions of Section 22 of the Longshoremen's and Harbor Workers' Compansation Act, 33 U.S.C. 922, specifically authorizing modifications "decreasing the compensation rate [to be] made effective *from the date of injury*", the modifications here made of the previous order so as to have it conform retroactively to current facts was proper. *Bethlehem Shipbuilding Corporation* v. *Cardillo*, 102 F.2d 299 (C.A. 1, 1939); *The Jarka Corporation* v. *Hughes*, 299 F.2d 534 (C.A. 2, 1962).

ARGUMENT

I

The deputy commissioner's finding that claimant's permanent partial disability from and after June 1, 1962 was but 15 per cent is supported by the record considered as a whole.

(a) Scope of Review

The scope of judicial review in cases such as the one at bar is set forth in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), in which the Supreme Court said:

> • • • The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456. *It is sufficiently described by saying that the findings are to be ac-*

cepted unless they are unsupported by substantial evidence on the record considered as a whole. * * *

* * * *

* * * *We do not mean that the evidence compelled this inference*; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. * * * (Emphasis supplied.)

Similarly with reference to the inferences drawn by a deputy commissioner, the Supreme Court in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), said:

> In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. *But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference* that an injury did or did not arise out of and in the course of employment *is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable.*
>
> * * * It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. (Emphasis supplied.)

And in language even more restrictive the Supreme Court in *O'Keeffe* v. *Smith, Hinchman & Grylls*, —— U.S. ——, decided March 29, 1965 (not yet reported), 33 L.W. 3320, has added:

> The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner, *are to be accepted unless they are irrational* or "unsupported by substantial evidences on the record as a whole." * * *
>
> * * * *
>
> We agree that the District Court correctly affirmed the finding of the Deputy Commissioner. While this Court may not have reached the same conclusion as the Deputy Commissioner, *it cannot be said that his holding* * * * *is irrational* or without substantial evidence on the record as a whole . . . (Emphasis supplied.)

Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States, as well as by this Court (*Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958); *Liberty Mutual Life Insurance Co.* v. *Britton*, 100 U.S. App. D.C. 236, 243 F.2d 659 (1957); *United States Fidelity and Guaranty Co.* v. *Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951)), a court may not set aside a compensation order unless, on the whole record, the court believes that the deputy commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order complained of.

Accordingly, logical deductions and inferences which are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935); *Wolff* v. *Britton*, 117 U.S. App. D.C. 209, 328 F.2d 181 (1964); *Crescent Wharf & Warehouse Company* v. *Cyr*, 200 F.2d 633 (C.A. 9, 1952); *Liberty Mutual Ins. Co.* v. *Gray*, 137 F.2d 926 (C.A. 9, 1943); *Lowe* v. *Central Ry. Co. of N.J.*, 113 F.2d 413 (C.A. 3, 1940); *Contractors PNAB* v. *Pillsbury*, 150 F.2d 310 (C.A. 9, 1945);

Southern Stevedoring Co. v. *Henderson*, 175 F.2d 863 (C.A. 5, 1949). Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *Phoenix Assurance Company of New York* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1940); *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935).

The deputy commissioner's findings of fact are presumed to be correct, *Anderson* v. *Hoage*, 63 App. D.C. 169, 70 F.2d 773 (1934); *Burley Welding Works, Inc.* v. *Lawson*, 141 F.2d 964 (C.A. 5, 1944); *Pan American Airways* v. *Willard*, 99 F.Supp. 257 (N.Y. 1951); they are to be accepted unless unsupported by substantial evidence in the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Voris* v. *Eikel*, 346 U.S. 328 (1953); *Phoenix Assurance Company of New York* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *United States Fidelity & Guaranty Co.* v. *Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951); *Crescent Wharf & Warehouse Co.* v. *Cyr*, 200 F.2d 633 (C.A. 9, 1952); *Walsh Stevedoring Co.* v. *Henderson*, 203 F.2d 501 (C.A. 5, 1953); *Gooding* v. *Willard*, 209 F.2d 913 (C.A. 2, 1954); *Charleston Shipyards* v. *Lawson*, 227 F.2d 110 (C.A. 4, 1955). The burden is on the plaintiff to show that the evidence before the deputy commissioner does not support the compensation order complained of in the review proceeding. *Southern Stevedoring Co.* v. *Henderson*, 175 F.2d 863 (C.A. 5, 1949); *Gulf Oil Corporation* v. *McManigal*, 49 F. Supp. 75 (W.Va., 1943); *Eastern S.S. Lines* v. *Monahan*, 26 F.Supp. 944 (Me. 1939)); cf. *National Lead Co.* v. *Kingsland*, 74 F.Supp. 985 (D.C. 1948).

(b) The Evidence

The record of the modification proceedings before the deputy commissioner reveals that claimant, according to his own testimony, had been working steadily for the Marjorie Merriweather Post May estate as a gardener *since June 1, 1962*, earning *$80.00* a week when he works a five-day week; that some weeks he even works six days (T.* 11-12, 24; J.A. 13); that when claimant worked six days, he was paid *$100.00* for that week; that if he worked as much as seven days in a week, he would then be paid *$120.00* (T. 17, Respondents' Exhibit "A"; J.A. 14); that at the time of his injury on March 31, 1960, claimant had been working for Antonio Troiano Tile & Marble Co., Inc., earning $80.00 per week (T. 28; J.A. 17).

From medical evidence, it was shown that Norman Horwitz, M.D., a neurosurgeon, first examined claimant on April 13, 1960 (T. 46; J.A. 22); that Dr. Horwitz again examined claimant on August 21, 1962, at which time claimant had some back restriction (T. 48; J.A. 22-23); that Dr. Horwitz once again exaimed claimant in November of 1962, at which time he found no change from the last examination (T. 49; J.A. 23); that, still later, Dr. Horwitz examined claimant on January 15 and February 18, 1963, at which time he complained about his neck; that Dr. Horwitz did not feel the neck complaint to be related to the March 31, 1960 employment injury (to claimant's back); that Dr. Horwitz then referred claimant to the Washington Hospital Center for medical evaluation; that x-rays there confirmed the doctor's impression that claimant was suffering from cervical arthritis; that in the opinion of Dr. Horwitz there was no relationship between claimant's arthritis and his low-back injury (of March 31, 1960) (T. 50; J.A. 23-24); that Dr. Horwitz subsequently examined claimant on

* T. refers to the typewritten transcript of the proceedings before the deputy commissioner.

May 3, 1963 and on October 30, 1963 (T. 51; J.A. 24); that, with respect to claimant's body as a whole, the doctor was of the opinion that claimant's permanent disability as a result of his back injury *did not exceed 15 per cent* (T. 52; J.A. 25).

(c) Discussion

The deputy commissioner's task in the instant case, as trier of the facts, was to decide from the record, and the inferences to be drawn therefrom, whether, as the result of a change in claimant's physical improvement as demonstrated by claimant's increased earning capacity to a point even exceeding his pre-injury wages, modification of the earlier compensation order was warranted.

It was solely within the province of the deputy commissioner, as such trier of the facts, to determine the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability: *Kwasizur* v. *Cardillo*, 175 F.2d 235 (C.A. 3, 1949), *cert. den.*, 338 U.S. 880; *Gooding* v. *Willard*, 209 F.2d 913 (C.A. 2, 1954); *Wilson & Co.* v. *Locke*, 50 F.2d 81 (C.A. 2, 1931); *Hudnell* v. *O'Hearne*, 99 F.Supp. 954 (Md. 1951); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403 (C.A. 2, 1961); *Associated General Contractors* v. *Cardillo*, 70 App. D.C. 303, 106 F.2d 237 (1939). In determining such credibility, he was not, of course, required to accept the testimony of the claimant or of claimant's witnesses. See in this connection *Kwasizur* v. *Cardillo*, *supra*, 175 F.2d 235 (C.A. 3, 1949), *certiorari denied*, 338 U.S. 880, in which the Court of Appeals said:

> * * * As for Kwasizur himself, it could hardly be claimed that the Deputy Commissioner was bound to accept the truth of the story, even though it were not contradicted, if it seems to him, as the trier of facts, an improbable one. We think, therefore, if no further testimony had been presented except that offered on behalf of the claimant, the finding against him could not be disturbed by a court.

The rule as to acceptance upon judicial review of the deputy commissioner's evaluation of the credibility of witnesses applies also to medical witnesses: *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (C.A. 5, 1962); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403 (C.A. 2, 1961); *Gooding* v. *Willard*, 209 F.2d 913 (C.A. 2, 1954). With respect to any conflict in the medical testimony offered by the parties, a deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Todd Shipyards Corp.* v. *Donovan, supra*, 300 F.2d 741 (C.A. 5, 1962); *Hampton Roads Stevedoring Corp.* v. *O'Hearne*, 184 F.2d 76 (C.A. 4, 1958); *Baltimore & O. R. Co.* v. *Clark*, 56 F.2d 212 (Md. 1932); *Jarka Corporation of Philadelphia* v. *Norton*, 56 F.2d 287 (Pa. 1930); *Liberty Stevedoring Co.* v. *Cardillo*, 18 F.Supp. 729 (N.Y. 1937); *Zurich General Accident & Liability Ins. Co., Ltd.* v. *Marshall*, 42 F.2d 1010 (Wash. 1930); *Ryan Stevedoring Co.* v. *Norton*, 50 F.Supp. 221 (Pa. 1943); *Liberty Mutual Ins. Co.* v. *Marshall*, 57 F.Supp. 177 (Wash. 1944), *aff'd*, 151 F.2d 1007 (C.A. 9, 1945); *Contractors PNAB* v. *Pillsbury*, 150 F.2d 310 (C.A. 9, 1945); *Crescent Wharf & Warehouse Co.* v. *Cyr*, 200 F.2d 633 (C.A. 9, 1952); *Marine Operators* v. *Barnhouse*, 61 F.Supp. 572 (Ill. 1944); cf. *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

The evidence disclosed that Mr. Pistorio is now actually earning higher wages than those he was paid at the time of his injury. However, despite this increase, the deputy commissioner in the exercise of the discretion vested in him by Section 8(h) of the Act, 33 U.S.C. 908(h),[3] favored claimant through the finding that claim-

[3] This section provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly

ant had nevertheless not been restored to his full pre-injury earning capacity. Instead, guided by the medical evidence of record of a 15 per cent impairment, the deputy commissioner concluded that the employee still had some loss of *earning capacity*, despite the increased post-injury *wages*. This capacity loss he found to be 15 per cent, rather than the previously found 50 per cent. The effective date of this manifest improvement was placed at June 1, 1962 because that was the date when the evidence, including claimant's own testimony, disclosed that the employee had commenced working for the increased wages. Certainly, in the light of the evidence of record, it cannot be said that the evidence "compelled" a contrary conclusion. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). Nor can it be said that the deputy commissioner's finding of improvement was "irrational" *O'Keeffe* v. *Smith, Hinchman & Grylls*, —— U.S. ——, decided March 29, 1965 (not yet reported), 33 L.W. 3320.

II

The deputy commissioner's modification order awarding compensation retroactively from June 1, 1962 was in accordance with law.

Claimant contends that the deputy commissioner's action in making the modification retroactive is not in accordance with law. This argument, which is addressed solely to the six or seven week period between June 1,

---

and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

1962 and August 20, 1962, completely overlooks the express provisions of Section 22 of the Act, 33 U.S.C. 922, pursuant to which modifications are authorized. With reference to retroactivity, this section states specifically that "an award decreasing the compensation rate *may be made effective from the date of the injury.*" While the beneficiary is not liable to return compensation previously paid, deduction for any payment in excess of the decreased rate is required to be made from any unpaid compensation.

The procedure adopted by the deputy commissioner in making modification but followed the provisions of the Act. It accords with the result reached in other cases of modification. The very purpose of Section 22 is to enable a deputy commissioner on a subsequent administrative review to change the finding previously made to conform to the current facts. *Bethlehem Shipbuilding Corporation* v. *Cardillo*, 102 F.2d 299 (C.A. 1, 1939). And the deputy commissioner's placement of the claimant's improvement at a period prior to the earlier award, but after the date of injury comports with the retroactive authority granted the deputy commissioner. See *The Jarka Corporation* v. *Hughes*, 299 F.2d 534 (C.A. 2, 1962). In the instant case, the deputy commissioner has clearly set forth in his modifying order the new facts and circumstances which, as of June 1, 1962, were at variance with those originally believed to exist at the time the August 20, 1962 order was filed and which, therefore, necessitated change in that earlier order.

Claimant now asserts in this appeal (having failed, however, to do so in the court below) that the deputy commissioner was "barred" from making his modification retroactive. Reliance therefor is predicated upon allegations that the deputy commissioner had "instructed" counsel that he would hear "no testimony" relative to "any conditions" that existed prior to the date the earlier compensation order (which was the subject of the instant modification proceedings) had been filed (claimant's typed brief, page 11). With reference to the lack of merit to

this contention, it is perhaps significant to observe that claimant never sought to raise this theory below. Moreover, as we shall now see, the deputy commissioner made no such sweeping ruling as claimant here asserts.

Because the earlier order had been the culmination of agreement and not the result of an adversary hearing, thereby making reference to any previously transcribed medical evidence impossible, the deputy commissioner stated in explanation of why he was restricting *medical* testimony to claimant's physical condition following filing of the original order (T. 94-95; J.A. 31):

> THE DEPUTY COMMISSIONER: The reason we are at this hearing and have been at this hearing since October of 1963 is that the parties had agreed informally for filing of an order, there was no hearing, the parties agreed, and this office filed a Compensation Order awarding compensation to Mr. Pistorio at a time when he was not working, claiming disability, and we found from a review of the medical reports that the disability he sustained was the rupture of a disc as I just described, which caused the development of a right inguinal hernia.
>
> Now we are at these hearings because the employer and the insurance carrier filed an application for review, as is the procedure, on the ground that the disability of Mr. Pistorio has decreased.
>
> Now, medically speaking, Dr. Masterson, is Mr. Pistorio in your opinion 50 per cent disabled because of the residuals in November 1963 from the nature of the injury that I described to you, which is in my Commission Order?
>
> THE WITNESS: In my opinion it could be—he could be 50 per cent disabled from the events as you described them.

And the witness, who was *claimant's own medical expert* (T. 82; J.A. 29) stated that in his opinion claimant's disability when examined by the witness in November 1963 was *as it had been at the time of the compensation order*. Further, the deputy commissioner's

announced purpose with respect to examination of medical witnesses was at several points in the hearing actually relaxed to favor claimant whose counsel cross-examined the employer's medical witness, Dr. Horwitz (T. 45-46; J.A. 22), with respect to medical matters antedating the compensation order. (T. 55, 56, 57, 58, 59-60, 66, 69-70; J.A. 25-27).

Testimony concerning claimant's present employment, and the date it commenced, was received without restriction. Thus, evidence relating thereto was admitted by express agreement of claimant's counsel (T. 16-17; J.A. 13), as well as by the presentation of a lay witness who testified specifically on this subject (T. 71-72; J.A. 28). And claimant himself also testified with reference to the commencement of his work as a gardener on June 1, 1962 (T. 11-12, 86; J.A. 13).

We might point out that even were it to be assumed, *arguendo*, that the deputy commissioner had erred in his ruling on evidence with respect to the foregoing, such error might, at most, constitute a basis for remand to the deputy commissioner with respect merely to the period beween June 1, 1962 and August 20, 1962. Obviously, supported as the modification is by the record, it would not vitiate the order under review in its entirety.

CONCLUSION

In view of the above, it is the respectful submission of the appellee deputy commissioner that the compensation order complained of is in accordance with law and that the judgment of the court below sustaining it was proper and should be affirmed.

DAVID C. ACHESON,
United States Attorney.

CHARLES T. DUNCAN,
Principal Assistant United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.
Attorneys for Appellee Einbinder

CHARLES DONAHUE,
Solicitor of Labor.

ALFRED H. MYERS,
GEORGE M. LILLY,
Attorneys, U.S. Department of Labor,
Of Counsel.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 771474 770